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MICHAEL RODAK

No. 80-482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY OF LEAD INDUSTRIES ASSOCIATION, INC. TO BRIEF OF ENVIRONMENTAL PROTECTION AGENCY

EDWIN H. SEEGER

PRATHER SEEGER DOOLITTLE & FARMER
1101 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 296-0500

Attorney for Petitioner
Lead Industries Association, Inc.

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The Government contends in its brief in opposition to LIA's petition for certiorari that Congress has left health determinations entirely to the Administrator's judgment, and the Administrator does not have to make "significant risk" findings, similar to those that must be made under the Occupational Safety and Health Act, in order to justify a health standard. We will show below that the Government is wrong on these counts, and in its further contention that the Administrator in any event made findings equivalent to those that would be required under the "significant risk" test. Further, the Government's claim that the Administrator has virtually unbridled discretion in the setting of health standards

presents precisely the same overbroad claim of administrative agency power that led the Court to overturn OSHA's benzene standard, *Industrial Union Dep't* v. *American Petroleum Inst.*, 100 S.Ct. 2844 (1980). Hence, the Government's brief merely lends further weight to LIA's contention that there is urgent need for the Court to hear this case and to issue a decision defining EPA's standard-setting powers under Section 109 of the Clean Air Act.

1. LIA's petition for certiorari points out that there is language in the legislative history of the Clean Air Act stating that *all* EPA regulations concerning public health protection must be designed to prevent "significant risk of harm" (Petition, p. 11 n. 8; see H.R. REP. No. 95-294, 95th Cong., 1st Sess. 43-49 (1977)). Nowhere does the Government's brief attempt to rebut this point, nor does it at any time even refer to the cited legislative history passages. Accordingly, the Government has provided no basis for its contention that there is no requirement in the Clean Air Act comparable to that in the Occupational Safety and Health Act that health standards be predicated on findings of "significant risk" and its further contention that the Court's decision in the *Benzene* case is therefore not in point.

While the foregoing should make it clear that the same test applies under both statutes, it is also the case that the Government's effort to distinguish between the statutes insofar as the setting of health standards is concerned proves nothing. Certainly, the statutes are different in their details, but the concept that the setting of health standards involves a balancing of the need to protect the public health with the need to maintain a strong economy applies under the Clean Air Act no less than under the Occupational Safety and Health Act. As

Senator Muskie stated during the hearings preceding enactment of the 1977 Amendments, Congress intended to set national standards only at levels necessary to protect against "unacceptable risks," and intended "to insure that public policy is wise policy, that we are protecting health and not overprotecting it, to the degree of inhibiting economic growth and the opportunities people need in order to enhance their lives." *Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess., Part 3 at 6-7 (1977); see also remarks of Senator Muskie during the debates on the 1977 Clean Air Act Amendments quoted at pages 15-16 of LIA's petition (national primary standards "are not clean air standards" but are "the minimal burden we could impose on the dirty air areas of the country to clean up without bringing their economies to a screeching halt. *** Even at the national primary standard level, which is the health standard, there are health effects which are not protected against").

The clear intent of Congress that EPA's health standards are to be designed to prevent "significant risk" of harm to health and that no effort should be made to eliminate all health effects but only those that are clearly adverse has been ignored by the Administrator. And since health standards are the very cornerstone of the Clean Air Act, there is an important need for a decision by the Court setting guidelines for the exercise of the Administrator's powers under Section 109 of the Act.

2. The Government contends that even if the Administrator's findings must meet the "significant risk" test, he in fact made findings on health impairment that

meet the test and these findings "are supported by reputable scientific thought" (Government Brief, p. 10). The latter quote is supposedly taken from the Court's *Benzene* decision, but it is actually a misquote. The *Benzene* decision states that significant risk determinations must be based on "*a body of* reputable scientific thought," 100 S.Ct. at 2871 (emphasis supplied), and as LIA's petition points out, the Administrator's view that adverse health effects *may* occur in children at blood lead levels below 40 micrograms per deciliter (ug/dl) was supported at EPA's hearings by only three medical witnesses none of whom was able to state in what way children suffer health impairment at those blood lead levels.

Moreover, there is no basis for the Government's contention that the Administrator made clear-cut findings that children suffer harm at blood lead levels lower than 40 ug/dl, and as low as 30 ug/dl. As LIA's petition points out at page 7, the Administrator's findings concerning health effects at blood lead levels below 40 ug/dl were inconsistent and were couched in such vague terms as "potentially adverse" and "not without health significance."

The Government's brief cites two sources for the proposition that the Administrator's findings meet the concerns expressed by the Court in the *Benzene* case (Government Brief, p. 11). One citation is to the decision of the court of appeals, which was rendered prior to the Court's *Benzene* decision and hence did not address itself to the issues raised in *Benzene*. Moreover, as LIA's petition points out at page 13, the court of appeals was never able to point to any clearcut findings by EPA's Administrator of health impairment at blood lead levels lower than 40 ug/dl.

The second citation is to the preamble to EPA's lead standard regulation (Appendix, pp. 141a-145a). LIA would invite the Court's attention to the cited passages, for nowhere in them is there a single finding that would indicate that children suffer a significant risk of health impairment — much less an explanation of the nature of such impairment — at blood lead levels below 40 ug/dl. To the contrary, the cited passages clearly state that the health effect with which EPA is supposedly concerned, heme synthesis impairment, does not occur "until a threshold of 40 ug Pb/dl is reached" (Appendix, p. 142a). Moreover, EPA has not explained in the cited passages or anywhere else why such impairment should be regarded as adverse to health even at that blood level.

Ultimately, the Government is driven to quoting at page 9 of its brief a statement by the court of appeals that the Administrator must design health standards so as "to protect against effects which have not yet been uncovered by research" (Appendix, p. 45a). Clearly, there is no way to reconcile the concept that the Administrator is free to guess about the future course of medical research with the requirement that health standards must be designed to prevent "significant risks."

3. The Government contends that the Administrator did not adopt multiple margins of safety, but simply made a series of "scientific judgments" based on "the best available evidence" (Government Brief, p. 13). The short answer to that point is that if EPA's Administrator establishes a blood lead goal for children at a level below that needed to prevent significant risk of harm to health, and then develops an air lead standard to meet the goal by making excessively conservative assumptions at each phase of the calculation process, whether one uses the term "multiple margins of safety" or "scientific

judgments'' the result is the same — an ambient air standard that is far more stringent than is necessary to protect against significant risks.

Respectfully submitted,

EDWIN H. SEEGER

Attorney for Petitioner
Lead Industries Association, Inc.

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